

No. 83-6453

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ROBYN LEROY PARKS,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a hearing in state court is constitutionally required whenever a criminal defendant alleges that he did not receive the effective assistance of counsel.
2. Whether, when the record reveals that the Petitioner's attorney performed within the competence demanded of attorneys in criminal cases, the standard applied, which was the "mockery of justice" test, violated the United States Constitution.

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RESPONDENT'S BRIEF IN OPPOSITION
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Respondent, the State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Court of Criminal Appeals entered in this case on January 25, 1984.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is an unpublished order, which was attached to the Petitioner's Petition as Appendix A. The order denying the Petitioner's post-conviction relief application in the trial court is an unpublished opinion, attached to the Petitioner's Petition as Appendix B.

The Oklahoma Court of Criminal Appeals had previously affirmed the Petitioner's conviction in Parks v. State, 651 P.2d 686 (Okla. Cr. 1982), and this Court denied certiorari on January 17, 1983, at 103 S. Ct. 800 (1983).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 21 O.S.Supp.1976, § 701.7, provided in part:

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

"B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

Title 21 O.S.Supp.1976, § 701.9, provided in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Title 21 O.S.Supp.1976, § 701.10, provided as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of

the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11, provided as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12, provided as follows:

"Aggravating circumstances shall be:

"1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

"2. The defendant knowingly created a great risk of death to more than one person;

"3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

"4. The murder was especially heinous, atrocious, or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13, provided as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of

Criminal Appeals together with a notice prepared by a clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals."

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

The Petitioner, Robyn Leroy Parks (hereinafter referred to as "Petitioner"), was convicted of one count of Murder in the First Degree in the District Court of Oklahoma County in violation of 21 O.S.Supp.1976, § 701.7. The Petitioner was convicted by a jury which then heard evidence in the second stage of the trial

and found the existence of one aggravating circumstance and sentenced the Petitioner to death.

The facts of the case are set forth in detail in the opinion of the Oklahoma Court of Criminal Appeals reported as Parks v. State, 651 P.2d 686 (Okl.Cr. 1982). Briefly stated, the Petitioner used a stolen credit card to pay for gasoline at a service station. When he noticed the station attendant, Abdullah Ibrahim, writing the tag number of his vehicle, Parks feared that Ibrahim would report the stolen card to the police. The Petitioner then fatally shot Ibrahim once in the chest and left the scene.

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION I

THE TRIAL TRANSCRIPT REVEALS THAT THE PETITIONER WAS EFFECTIVELY REPRESENTED AT TRIAL AND THEREFORE WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON THAT ISSUE.

The Petitioner contends that he should have received an evidentiary hearing in state court on the issue of whether he received the effective assistance of counsel in this case.

No authority has been cited to support the contention that a state is required to conduct an evidentiary hearing to consider a claim of ineffective representation by trial counsel. The Supreme Court has mandated hearings in state courts on certain issues in criminal proceedings. Jackson v. Denno, 378 U.S. 368 (1964) (hearing required to determine voluntariness of confession); Holloway v. Arkansas, 435 U.S. 475, 487 (1978) (trial court under duty to examine defense attorney's contention of existence of conflict of interest).

However, on other issues the Court has reviewed the facts of a particular case to determine whether constitutional error was committed by failing to hold a hearing at the defendant's request. In Watkins v. Sowders, 449 U.S. 341 (1981), the Court refused to adopt a *per se* rule requiring a hearing outside the presence of

¹ The jury found that the Petitioner committed the murder for the purpose of avoiding or preventing a lawful arrest or prosecution. 21 O.S.Supp.1976, § 701.12(5).

the jury to determine the admissibility of eyewitness identification testimony. In McMann v. Richardson, 397 U.S. 759, 771 (1970), the Court held that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his federal petition for writ of habeas corpus.

The Petitioner claims that the trial attorney was incompetent during the penalty phase of the capital trial because he was physically ill, failed to present mitigating evidence and failed to properly prepare for the sentencing stage. An evaluation of defense counsel's performance based upon the trial record reveals that defense counsel acted competently in accordance with applicable case law and the analytical framework set forth in Goodpaster, The Trial for Life: Effective Assistance of Counsel In Death Penalty Cases, 58 New York Law Rev. 299 (1983).

This Court has not articulated a uniform standard for measuring the effectiveness of counsel. The Tenth Circuit Court of Appeals in Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), complied with the majority of circuits to hold that the Sixth Amendment required assistance of counsel to be measured against a standard higher than "sham and mockery." The Oklahoma Court of Criminal Appeals in Johnson v. State, 620 P.2d 1311 (Okl.Cr. 1980), adopted the Dyer standard of reasonably competent assistance of counsel. A defense attorney's actions should be viewed in the context of his overall performance, rather than dissection of his advocacy and second-guessing of each individual action. Stanley v. Zant, 697 F.2d 955, 962 (11th Cir. 1983); Beckham v. Wainwright, 639 F.2d 262, 265 (11th Cir. 1981). Thus, the competency question could be framed as follows: given what counsel knew or reasonably should have known, would a reasonably competent attorney have made the choice that trial counsel made? Goodpaster, *supra*, at 344. Upon consideration of the trial record and the Petitioner's failure to produce any additional mitigating evidence which defense counsel failed to obtain, the Respondent submits that Petitioner has failed to meet the burden of proving that defense counsel acted incompetently during the penalty stage of the capital trial.

Notwithstanding the imposition of the death sentence, defense counsel's presentation during the penalty phase of trial contained each of the four elements of the mitigating case discussed by Goodpaster. First, defense counsel, through examination of the Petitioner's father (Tr. 667-72) and closing argument (Tr. 709), attempted to "portray the [Petitioner] as a human being with positive qualities." Goodpaster, *supra*, at 335. Indeed, the foundation for this portrayal was laid during the first stage of the trial through defense counsel's examination of the Petitioner (Tr. 464) and in the closing statement (Tr. 579-612).

Second, defense counsel attempted "to show that the [Petitioner's] capital crimes are humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is." *Id.*, at 335; See, Eddings v. Oklahoma, 455 U.S. 104 (1982). A significant illustration of this element is defense counsel's examination of the Petitioner's father, a former convicted felon who was gainfully employed at the time of trial (Tr. 667-71, 681-83). This element of mitigation is also illustrated by defense counsel's discussion of the impact on the Petitioner of his family life, economic situation, and general racial tensions during closing argument at the second stage of trial (Tr. 715).

Third, the fifteen-page closing statement (Tr. 708-23) presented by defense counsel during the penalty stage is clearly an articulate and carefully prepared attempt "to try the death penalty itself by presenting evidence and argument against its application in the particular case." Goodpaster, *supra*, at 336. Defense counsel recounted his experiences with death during his military service in Vietnam and his involvement in the enactment of the death penalty statute during his tenure as a legislator. Moreover, defense counsel questioned with specificity the existence of any of the three proposed aggravating circumstances, cited the Petitioner's father as an illustration of a successfully rehabilitated convict, and generally made a strong plea in opposition to the death penalty.

Finally, the jury's failure to find as an aggravating circumstance that the Petitioner might in the future commit criminal acts of violence in part attests to defense counsel's investigation and preparation of a rebuttal case against any evidence of other crimes or circumstances in the Petitioner's background which the prosecution attempted to introduce in aggravation at the penalty phase. Id., at 337. Skillful cross-examination of the primary prosecution witness during the penalty stage (Tr. 689-93), supported by testimony elicited from the Petitioner's father (Tr. 669-70) and statements during closing argument (Tr. 714), indicate that defense counsel recognized the importance of the penalty stage proceedings and had prepared accordingly. The trial record herein may be contrasted with cases where defense counsel, by failing to present evidence or argument, does not successfully shift into the role of advocate during the penalty stage of a capital trial. Id., at 337, and cases cited therein at Note 151.

Thus, since the Petitioner has failed to establish a *prima facie* case that defense counsel was incompetent, it is not necessary to examine whether counsel's performance was prejudicial to the Petitioner. See, Strickland v. Washington, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, 103 S. Ct. 2451 (1983) (No. 82-1554).

PROPOSITION II

THE APPROPRIATE STANDARD WAS USED BY THE OKLAHOMA COURT OF CRIMINAL APPEALS TO EVALUATE TRIAL COUNSEL'S PERFORMANCE.

The Petitioner suggests that the Oklahoma Court of Criminal Appeals improperly applied the "sham and mockery" standard in its evaluation of trial counsel's performance on appeal of the denial of post-conviction relief. This assertion is without merit because, as stated above, this Court has not expressed a uniform national standard for competency of counsel in criminal cases because lower courts. Furthermore, an independent review of the record reveals that the trial counsel performed "'within the range of competence demanded of attorneys in criminal cases.'" Tollett v. Henderson, 411 U.S. 258, 266 (1973); McMann v. Richardson,

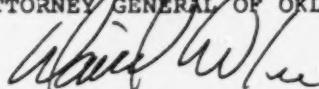
supra, 397 U.S. at 771; Beckham v. Wainwright, supra, 639 F.2d at 267.

CONCLUSION

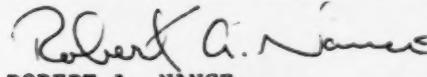
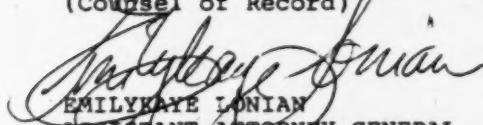
For the reasons stated, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA



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CERTIFICATE OF MAILING

On this 26 day of April, 1984, a true and correct copy of the foregoing was mailed, postage prepaid, to:

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DAVID W. LEE

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